too narrow to deal with the large industrial units of today.[21] No more definite test can be applied to the varied and complicated cases that will arise under this section of the Clayton Act than a standard of reasonableness under all the circumstances, considering, as factors in determining whether the public is prejudiced, the nature of the business, its size and the methods employed, and the resultant social as well as economic consequences.

ACTION UNDER THE CODES AGAINST REPRESENTATIVE DEFENDANTS. — The code provision for the representation of large numbers,[1] "class suits," is adopted from the old practice in chancery,[2] and applies to legal and equitable actions.[3] The code contemplates a procedural remedy[4] designed to decrease litigation.[5] Justice and fairness[6] to the parties, therefore, should alone limit its application. An Ontario court[7] refused to order the representation of a class of defendants, on the grounds that "common interest" in a correspond-

---

[21] See U. S. *v.* Keystone Watch Case Co., 218 Fed. 502, 519 (E. D. Pa., 1915); Hubbard *v.* Miller, 27 Mich. 15, 19, (1873).

[1] "When the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." See 1920 NEW YORK LAWS, c. 925 as amended 1921, art. 24, §195; PARSONS, PRACTICE MANUAL NEW YORK (1921), 81. This provision is common to the modern American practice codes. See POMEROY, CODE REMEDIES, 4 ed., 379, 380 n. 1.

Under the English rule a court order is necessary to authorize suing one or more defendants on behalf of all. See RULES OF SUPREME COURT, 1883, Order XVI, rule 9; ANN. PRAC. 1922, 233, 236; CONSOLIDATED RULES OF PRAC. AND PROC. OF SUP. CT. OF JUD. (Ont.), rule 75. See HOLMSTED, ONT. JUD. ACT, 4 ed., 435.

[2] See George *v.* Benjamin, 100 Wis. 622, 629, 76 N. W. 619, 621 (1898); Duke of Bedford *v.* Ellis, [1901] A. C. 1, 8. See POMEROY, *op. cit.*, 384–5.

[3] Platt *v.* Colvin, 50 Ohio St. 703, 36 N. E. 735 (1893); Penny *v.* Central Coal and Coke Co., 138 Fed. 769 (8th Circ., 1905). See POMEROY, *op. cit.*, 175.

[4] See POMEROY, *op. cit.*, 268–9.

[5] For multiplicity as a ground of equity jurisdiction, see 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 243 *et. seq.*

[6] The practice in chancery of permitting one or more to sue or defend on behalf of all is old. See Cockburn *v.* Thompson, 16 Ves. 321, 327 (1809); Adair *v.* New River Co., 11 Ves. 429, 443 (1805); West *v.* Randall, 2 Mason (R. I.) 181, 193–6 (1820). As the general rule of making necessary all parties having an interest apparent on the record in the object of the suit was a rule of convenience, so the departure therefrom by a representative suit was prompted by convenience. See CALVERT, PARTIES TO SUITS IN EQUITY, 2 ed., 21 *et seq.* The question must have been one of common or general interest, or the parties must have been too numerous to be brought before the court. See STORY, EQUITY PLEADING, 10 ed., § 97 *et seq.* There must have been such defendants on the record as fairly to maintain the several interests adverse to those of the plaintiff. See CALVERT, *op. cit.*, 43. The right to be tried had to be in the nature of a general right. Adair *v.* New River Co., *supra.* For the operation in equity, see in addition: American Steel and Wire Co. *v.* Wire Drawers' Union, 90 Fed. 598 (N. D. Ohio, 1898); Smith *v.* Swormstedt, 16 How. (U.S.) 288 (1853); Supreme Tribe of Ben-Hur *v.* Cauble, 255 U. S. 356 (1921). See FEDERAL EQUITY RULES, 38, 198 Fed. xxix.

[7] Barrett *v* Harris, 21 Ont. W. N. 293 (1921). For the facts of this case, see RECENT CASES, *infra* p. 110.

ing provision meant "beneficial proprietary interest," [8] and that the provision did not apply to tort actions. By such language the courts have long been narrowing [9] the application of a desirable rule. The real question is: assuming that the court has jurisdiction, considering all the circumstances, to what extent is it reasonable to bind parties not actually before the court? [10]

Literally a broad rule, it contains on its face but two limitations: that among the parties sought to be represented there exist a community of interest in the subject [11] of the action, and that the said persons be so numerous as to make it impracticable to bring them all before the court.[12] For the interpretation of the rule we must look to the practice in equity. "Common interest" is not readily definable.[13] The defendants must all defend an interest adversely to

---

[8] The phrase comes from Lindley, C. J., in an early decision under Order XVI, r. 9. Temperton *v.* Russell, [1893] 1 Q. B. 435. It persists after thirty years despite repeated disapproval. Duke of Bedford *v.* Ellis, [1901] A. C. 1; Taff Vale Ry. Co. *v.* Amalgamated Society of Ry. Servants, [1901] A. C. 426, 439 Small *v.* Hyttenrauch, 6 Ont. L. R. 388 (1903); Metallic Roofing Co. *v* Local Union 30, 9 Ont. L. R. 171 (1905). True, chancery by its decree would at first affect only a general proprietary right. See Adair *v.* New River Co., *supra*, 445. *Cf.* Wood *v.* McCarthy, [1893] 1 Q. B. 775, where immediately after Temperton *v.* Russel, *supra*, the court felt constrained to hold a contract obligation a "beneficial proprietary right."

[9] See Lord Lindley, Taff Vale Ry. Co. *v.* Amalgamated Society Ry. Servants, *supra*, 443; Adair *v.* New River Co., *supra*, 444. See note 8, *supra*.

[10] Equity seems early to have taken this approach. Adair *v.* New River Co., *supra*. Chancery did not hesitate to bind absent parties on a question of general right. See *ibid.*, 443–5. Consequential relief might then be had in another suit based on the finding. See American Steel & Wire Co. *v.* Wire Drawers' Union, *supra*, 604–5. The United States courts are more conservative; absent parties are not concluded and may relitigate. Am. Steel & Wire Co. *v.* Wire Draw. Union, *supra*. See FED. EQ. RULES, 39, 198 Fed. xxix. But they are bound by decrees of which they have notice, until set aside in subsequent proceedings. *In re* Lennon, 166 U. S. 548 (1897); Supreme Tribe of Ben-Hur *v.* Cauble, 255 U. S. 356 (1921); Tosh *v.* West Ky. Coal Co., 252 Fed. 44, 47–48 (6th Circ., 1918).

[11] "Object" would be more accurate. See CALVERT, *op. cit.*, 35; POMEROY, CODE REMEDIES, 4 ed., 385. This is born out by the distinction between the English and the American provisions. The latter is said to apply where there is a common interest among many, without excessive numbers, or where there are excessive numbers without the "common interest." McKenzie *v.* L'Amoureux, 11 Barb. (N. Y.) 516 (1851). See POMEROY, *op. cit.*, 383; STORY, *op. cit.*, 124. But clearly there always must exist a common interest in the right sought to be protected or established. May *v.* Wheaton, 41 Ont. L. R. 369 (1917). See STORY, *op. cit.*, 124–5.

[12] Whether the parties are sufficiently numerous depends on the particular circumstances. Sheffield Water Works *v.* Yeomans, L. R. 2 Ch. App. 8 (1866), (fifteen hundred); Hodges *v.* Nalty, 104 Wis. 464, 80 N. W. 726 (1899), (seventy-five); Platt *v.* Colvin, *supra* (one thousand); Van Brunt *v.* Wis. Home Ass'n, 163 Wis. 540, 158 N. W. 295 (1916), (twenty-seven hundred); Hendryx *v.* Money, 1 Bush (Ky.) 306 (1866), (fifty). *Cf.* Castle *v.* City of Madison, 113 Wis., 346, 89 N. W. 156 (1902), (mere allegation of great number — 256 — not enough to bring within the rule); Bear *v.* Am. Rap. Tel. Co., 36 Hun (N. Y.) 400, (1885) (5 insufficient).

[13] "Beneficial proprietary right," Temperton *v.* Russel, *supra*. "A common right invaded by a common enemy, although they have different rights *inter se*," Ellis *v.* Duke of Bedford, [1899] 1 Ch. D. 494, 516. "Relief sought beneficial to all," Bedford *v.* Ellis, [1901] A. C. 1, 8. "Common origin of the claims," as act

the plaintiffs.[14] The actual parties must be fairly representative [15] of all the interests of the class; and they must be members thereof and have an interest in the relief [16] sought. The courts have failed satisfactorily to define "common interest" beyond this, and as a consequence have felt constrained to evolve a myriad of interpretory rules which are honored apparently only in their breach.[17] The rule is particularly confused in its scope in the case of represented defendants.[18] The courts have enunciated a series of narrowing regulations [19] resting on an underlying reluctance to give judgment against parties not before them.[20]

---

of Parliament, Markt & Co., Ltd. *v.* Knight Steamship Co., Ltd., [1910] 2 K. B. 1021, 1029. "Common right infringed by wrongful act affecting all," Whitmore *v.* N. Y. Inter-Urban Water Co., 158 App. Div. 178, 180 (1913).

[14] Mercantile Marine Ass'n *v.* Toms, [1916] 2 K. B. 243; Wood *v.* McCarty, *supra.* See POMEROY, *op. cit.*, 385. See Reid *v.* The Evergreens & Johnson, 21 How. Prac. (N. Y.) 319, 321.

A convenient test of the ability to bring a class suit is whether all of those represented may join. From this some authorities erroneously conclude that wherever parties may join, there they may be represented. See POMEROY, *op. cit.*, 385. For the rule as to joinder of parties, see *ibid.*, 161, *et seq.* RULES OF SUPREME COURT (English), 1883, Order XVI, rule 1. *Cf.* Farnsworth *v.* Wood, 91 N. Y. 308 (1883); Edinger *v.* McDougall & York, 2 Alta. 345 (1909). Where, on the other hand, all must be joined, "necessary parties" in equity, joint obligors and obligees at law, a representative suit is disallowed. George *v.* Benjamin, *supra;* Hallett *v.* Hallett, 2 Paige (N. Y.) 15 (1829). See *contra,* Platt *v.* Colvin, *supra,* 710, 737–738. This was precisely the situation against which equity sought to relieve. See note 6, *supra.* Justice should not be defeated by a plea of non-joinder where a plaintiff can under no practical circumstances bring all the co-plaintiffs into court. The court should permit representation for the purpose of the suit and at least render judgment for the actual plaintiffs. Hodges *v.* Nalty, *supra. Cf.* Guffanti *v.* Nat. Surety Co., 196 N. Y. 452, 90 N. E. 174 (1909) (suit by creditor against insolvent debtor — suit for all compulsory).

[15] Walker *v.* Sur, [1914] 2 K. B. 930.

[16] Northwestern Banking Co. *v.* Muggli, 8 S. D. 160, 65 N. W. 442 (1895); Kelly *v.* Tiner, 91 S. C. 41, 49, 74 S. E. 30, 33 (1912).

[17] See notes 8 and 9, *supra.*

[18] The permission of a representative suit by parties plaintiff evidently presents less difficulty in this respect. The interests of the represented plaintiffs are in the majority of cases assured adequate protections. See Stevens *v.* Union Trust Co., 57 Hun (N. Y.) 498, 508 (1890). Parties not before the court are not bound in the absence of actual notice. Castle *v.* City of Madison, *supra.* If the decision be favorable, one may come in within a reasonable time and partake of the benefits. See Stevens *v.* Brooks, 22 Wis. 695, 703–4 (1868). *Contra,* Vashon Union *v.* Godwin, 87 Wash. 384, 151 Pac. 797 (1915). *Cf.* Bank of Rome *v.* Haselton, 15 Lea (Tenn.) 216 (1885). Litigation for the defendant is decreased. But the argument of multiplicity cannot be used by the plaintiff as a ground for bringing the suit in this form. See Cook *v.* Flagg,

---

[19] The provision has been held not to apply to tort actions. See Temperton *v.* Russell, *supra,* 438. *Contra,* Metallic Roof Co. *v.* Jose, 14 Ont. L. R. 156 (1907). To actions for the recovery of land. Berses *v.* Villanueva, 25 Philippine 473 (1913). *Contra,* Thames *v.* Jones, 97 N. C. 121, 1 S. E. 692 (1887). To actions requiring money damages. Walker *v.* Sur, [1914] 2 K. B. 930. *Contra,* Thames *v.* Jones, *supra.*

[20] Some courts have been influenced, also, by an unwillingness to give any but the simplest judgment. See Atkins *v.* Trowbridge, 162 App. Div. 629, 635 (1914).

In doing this the courts have recognized the jurisdictional difficulty in "class suits," but have enmeshed themselves because of their failure to dispose of that question at the outset. A judgment against a non-resident who has not been personally served within the state is invalid.[21] But service of parties representative, as agents or officers, of resident defendants, gives due notice and would therefore constitute such constructive service within the proper statutes as to give the court jurisdiction to render a personal judgment.[22] Moreover, property within the state, whether common property held by those served, or the individual property of the absent defendants, will give the court jurisdiction to render a judgment against that property.[23] For the non-observance of these fundamentals, absent parties are given an adequate remedy.[24]

Assuming the jurisdiction of the court over all of the defendants, the problem of a representative suit is simplified. The court in the principal case probably reaches a sound result; the case fails to disclose who committed or authorized the act, and, therefore, to satisfy an essential requisite to bringing a class suit, *viz.*, that the plaintiff assert a right adversely to all of the defendants.[25] The categorical language of the court,[26] however, is objectionable. Regardless of the form or theory of the action, judgment should be given against all the parties represented,[27] provided, that the plaintiff has been wronged by all of the defendants,[28] that the defendants are so numerous or uncertain as to make their joinder impracticable, and that the interests of all the defendants are fairly represented.[29]

---

255 Fed. 195, 199 (S. D. N. Y., 1915). Note that a representative suit is generally denied when all the members of the class, though they have a "common interest" in the subject of the action, have separate claims for damages, which, arising out of the same transaction, are in fact separate causes of action. Markt & Co., Ltd. *v.* Knight Steamship Co., Ltd., *supra;* Farnsworth *v.* Wood, 91 N. Y. 308 (1883). *Cf.* Skinner *v.* Mitchell, 108 Kan. 861, 197 Pac. 569 (1921).

For further incidents of representation of parties plaintiff, see POMEROY, CODE REMEDIES, 4 ed., 389 *et seq.* HOLMESTED, *op. cit.*, 435 *et seq.*

[21] Pennoyer *v.* Neff, 95 U. S. 714 (1877). See Austin W. Scott, "Jurisdiction over Non-Residents," 32 HARV. L. REV. 871.

[22] See Austin W. Scott, *Supra*, 871.

[23] Dewey *v.* Des Moines, 173 U. S. 193, 203 (1899).

[24] The court in the principal case indicated a willingness to apply the rule did the officers served hold a common fund. See Barrett *v.* Harris, *supra*, 294. But it must be noted that a common fund in the hands of the representative defendants, while it increases the practical convenience of levying execution, does not *per se* give jurisdiction to render a personal judgment against all of the defendants. De Arman *v.* Massey, 151 Ala. 639, 44 So. 688 (1907).

[25] Mercantile Marine Service Ass'n *v.* Toms, *supra.*

[26] *See* Barrett *v.* Harris, *supra*, 294.

[27] Commissioners of Sewers *v.* Gellatly, 3 Ch. D. 610 (1876).

[28] Such is the case of an act authorized or participated in by the entire class membership. Metallic Roofing Co. *v.* Jose, *supra.* Contrast the case where a member acts individually and without authority. Mercantile Marine Service Ass'n *v.* Toms, *supra;* Barrett *v.* Harris, *supra.*

[29] Wood *v.* McCarty, *supra;* Culley *v.* Elford, 187 Ala. 165, 65 So. 381 (1914). *Cf.* Walker *v.* Sur, *supra.*

A judgment against absent and unknown parties is not without precedent. A judgment for costs has been held valid against unknown residents served

The provision for the representation of large numbers is a beneficial one, based on the equitable policy of doling out partial justice [30] rather than denying it altogether. Each case must be considered on its merits. "Common interest" is a broad term and should not be defined. Inhaling the equitable spirit of the code remedies, the courts should allow the source of the rule in chancery practice to control as a guide, and the requirements of fairness and due process of law to mark out the boundaries. Within these limits, they should respond freely to the call of convenience.

JUDGMENT AS A BAR TO CONTEMPT PROCEEDINGS. — The courts, fearing that the usual criminal process was too slow and cumbrous, at an early date [1] assumed the power to punish summarily in cases where the course of justice was in danger of being obstructed. This power [2] is now deemed inherent in all courts of record.[3] Although limited by express constitutional [4] or legislative provisions or by complications resting upon the very nature of our government, its scope must always be determined by the public necessity for the maintenance and protection of the court's dignity [5] and the unhampered exercise of its functions.[6]

The question arose recently whether a court may punish summarily after a suit has been prosecuted to judgment. The Supreme

---

constructively. Watson *v.* McClane, 18 Tex. Civ. App. 212, 45 S. W. 176 (1898). *Cf.* Buck *v.* Simpson, 166 Pac. 146 (Okla. 1917). See authorities in L. R. A. 1918 F 609, *et seq.* *Cf.* RoBards *v.* Lamb, 127 U. S. 58 (1888) (Due process); Blessing *v.* McLinden, 81 N. J. L. 379 (1911).

Many cases are now disposed of by statutes permitting suits against unincorporated associations in the association name. The judgment is satisfied by association property. Taff Vale Ry. Co. *v.* Amal. Soc. Ry. Serv., *supra*.

[30] See West *v.* Randall, *supra*, 193–6.

[1] Contempts *in facie curiae* seem originally to have been punished by the usual process of indictment. Davie's Case, 2 Dyer, 188 (1561). This method was still in force as late as 1640. Harrison's Case, Cro. Car. 503 (1638). The earliest case found of a proceeding against a stranger for a libel on the court by the summary method was in 1720. Rex *v.* Middleton, Fort. 201 (1721); Rex *v.* Wiatt, 8 Mod. 123 (1723). The contrary opinion, that this power to punish summarily for contempt of court was co-eval with the constitution of the courts, must be discarded in the light of further historical knowledge. See The Queen *v.* Lefroy, L. R. 8 Q. B. 134, 137 (1873); The King *v.* Almon, 8 How. St. Tr. 51 (an undelivered opinion of Chief Justice Wilmot which has gained the strength of judicial utterance by its frequent citation). But see John Charles Fox, "The King *v.* Almon," 24 LAW. Q. REV. 184, 266.

[2] Respublica *v.* Oswald, 1 Dallas (Pa.), 318 (1788); Comm. *v.* Dandridge, 2 Va. Cas. 408 (1824). See United States *v.* Hudson, 7 Cranch (U. S.), 32, 34 (1812).

[3] Contempt of court has been defined as a power to punish summarily for any conduct that tends to bring the authority and administration of the law into disrepute or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation. See OSWALD, CONTEMPT OF COURT, 3 ed., 6. See, in general, Joseph H. Beale, "Contempt of Court, Criminal and Civil," 21 HARV. L. REV. 161.

[4] See Wilbur Larremore, "Constitutional Regulation of Contempt of Court," 13 HARV. L. REV. 615.

[5] See Carter *v.* Comm., 96 Va. 791, 816 (1899).

[6] See McLeod *v.* St. Aubyn, [1899] A. C. 549, 561